

No. 15,139.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ONE, INCORPORATED, a corporation,

Appellant,

vs.

OTTO K. OLESEN, individually and as POSTMASTER of the
City of Los Angeles,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLEE'S OPENING BRIEF.

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APPELLEE'S OPENING BRIEF.

Jurisdictional Statement.

This suit was filed in the District Court to enjoin the Postmaster from refusing to accept for mailing the October 1954 issue of "One", under authority of 18 U. S. C. A. 1461. Inasmuch as this Statute involves the postal service, the District Court had jurisdiction of the action under 28 U. S. C. A. 1339.

This Court has jurisdiction of the appeal from the District Court's Judgment under 28 U. S. C. A. 1291.

Statutes Involved.

The following portions of 18 U. S. C. A. 1461 are applicable to the case:

"Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and— * * *

“Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained * * *

“Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any Post Office or by any letter carrier. * * *”

Statement of the Case.

This is a suit brought in the District Court to enjoin the Postmaster from refusing to accept for mailing the October 1954 issue of “One”, under authority of 18 U. S. C. A. 1461.

In the District Court the parties agreed that the only issue involved was whether the magazine is nonmailable matter, and that the case could therefore be decided on Motions for Summary Judgment.

In deciding the case in favor of the Postmaster, the District Court considered the October 1954 issue of “One” which was attached as an exhibit to the Complaint, as well as the affidavits filed by the parties in support of their Motions for Summary Judgment.

The Appellant filed two affidavits. One was the affidavit of Eric Julber, to show that the Appellant’s attorney had examined samples of the European publications which are advertised in “One”, that he did not consider them to be in violation of the Postal Laws, and that he so advised the Appellant. The other was the affidavit of William Lambert, to show that the Business Manager of the Appellant had examined samples of the European publications which are advertised in “One”, that he had never

known of an instance where in his opinion one of these publications was obscene, except the one attached to the affidavit filed by the Appellee, and that if he had known of such a case he would have advised the publisher that he could no longer advertise in "One".

The Appellee filed the affidavit of Nelle C. Wood, to show the nature of one of the European publications which is advertised in "One".

Summary of Argument.

The October 1954 issue of "One" is nonmailable matter because the magazine "as a whole" is obscene. The story "Sappho Remembered" is lustfully stimulating to the homosexual reader, the poem "Lord Samuel and Lord Montagu" contains filthy language, and the advertisement for "The Circle" gives information for the obtaining of obscene matter.

The intent and motive of the publisher is immaterial to the issue of this case because there is no ambiguity as to the obscene nature of the magazine. Even if this is material, it does not appear that the Trial Court failed to consider it.

While it may be that an advertiser should not be held criminally responsible when he has no knowledge of the nature of the material advertised, he is responsible to the extent that a nonmailable advertisement cannot be carried in the mail.

The law is well established that the power of Congress to bar obscene material from the mail does not violate the Constitution.

ARGUMENT.

I.

The October 1954 Issue of "One" Is Nonmailable Matter Under the Provisions of 18 U. S. C. A. 1461.

A. A Statement of the Issue involved.

Some of the arguments made by the Appellant are that the Trial Court erred in finding that the October 1954 issue of "One" is nonmailable matter under 18 U. S. C. A. 1461; that the action of the Postmaster in refusing to accept the magazine for mailing was arbitrary, capricious and an abuse of discretion, unsupported by evidence; and that the Trial Court erred in concluding that the action of the Postmaster was correct.

It is submitted that these arguments raise one question, namely whether or not the October 1954 issue of "One" is nonmailable matter under the provisions of 18 U. S. C. A. 1461.

B. The Particular Portions of the Magazine Which Are Considered Obscene.

We contend that the magazine does constitute nonmailable matter because the magazine as a whole is obscene, and particularly because of the following three portions of the magazine:

1. The story entitled "Sappho Remembered", appearing on pages 12 through 15. Briefly stated, this story is obscene because lustfully stimulating to average homosexual reader.

2. The poem "Lord Samuel and Lord Montagu", appearing on pages 18 and 19. This poem is obscene because of the filthy words contained in it.

3. The advertisement for the Swiss publication "The Circle", appearing at the top of page 29. We do not contend that this advertisement is obscene in and of itself, but this advertisement makes "One" nonmailable matter because it gives information for the obtaining of obscene material.

C. Sappho Remembered.

As stated above, this story is considered obscene because lustfully stimulating to the average homosexual reader. The story deals with a lesbian love triangle, and contains descriptive passages and references calculated to excite lewd thoughts and sensual desires in the sexual deviate reading it. It is difficult to see what other purpose this story could possibly serve.

Admittedly going to sexual deviates, and probably only to sexual deviates, the contents of this story may be tested for obscenity according to its likely effect upon such persons.

In *United States v. Levine*, 83 F. 2d 156 (2 Cir., 1936), the Court said:

"It may appear that the prospective buyer in the eighth count was a youth and that the accused had reason to suppose that he was. The evil against which the statute is directed, would then be the possible injury to such a youthful reader."

In *Parmelee v. United States*, 113 F. 2d 729 (D. C. Cir., 1940), the Court noted:

"* * * book must be considered * * * in its effect, not upon any particular class but upon all those *whom it is likely to reach*." (Emphasis added.)

In *Walker v. Popenoe*, 149 F. 2d 511 (D. C. Cir., 1945), it was held that:

“* * * The effect of a publication on the ordinary reader is what counts * * * if a publication as a whole is not stimulating to the senses of the ordinary reader, it is not within the statute.”

With respect to “One”, it is respectfully submitted that the “ordinary reader” is the homosexual reader.

D. Lord Samuel and Lord Montagu.

Section 1461, in addition to its proscription of obscene, lewd and lascivious matters, also forbids the mailing of that which is filthy, held by the Supreme Court to constitute a separate class of matter from the obscene.

United States v. Limehouse, 285 U. S. 424 (1932).

In the *Limehouse* case the term filthy was held to apply to letters which were characterized by the Court as “coarse, vulgar, disgusting, indecent”.

See also *Tyomies Publishing Co. v. United States*, 211 Fed. 385 (6 Cir., 1914), which approved the following definition given by the Trial Judge:

“By the term ‘filthy’ is meant what it commonly or ordinarily signifies; that which is nasty, dirty, vulgar, indecent, offensive to the moral sense, morally depraving and debasing.”

The aforesaid poem “Lord Samuel and Lord Montagu” is concerned with the alleged homosexual activities of Lord Montagu, which are dealt with in the poem in a coarse, vulgar, disgusting manner.

As discussed above, in determining obscenity, the Courts will consider the effect of a publication upon those to

whom it is sent, inasmuch as in this phase of the law the question to be decided is whether it will have the tendency to arouse its readers sexually. However, the same would not be true in considering whether or not an article is filthy "within the popular meaning of the term", as the Supreme Court said in the *Limchouse* case. An article may be inherently vile, foul, disgusting, even though not regarded as such by a particular individual or group of individuals to whom it is sent because of their own social or moral standards far at variance and below those of the general community.

As this Court also observed in *Besig v. United States*, 208 F. 2d 142 (9 Cir., 1953):

"It is of course true that the ears of some may be so accustomed to words which are ordinarily regarded as obscene that they take no offense at them, but the law is not tempered to the hardened minority of society."

And the Supreme Court of the United States in its decision in *Hannegan v. Esquire, Inc.*, 327 U. S. 146 (1946), noted that "the validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes no matter how perverted."

E. The Advertisement for "The Circle."

In the Trial Court the affidavit of Nelle C. Wood was filed with the Appellee's Motion for Summary Judgment, to prove that the Swiss publication "The Circle", which is advertised in "One" is in fact obscene. If it is, this advertisement is also in violation of 18 U. S. C. A. 1461, because it gives information through the mails for obtaining obscene matter.

In submitting the July 1954 issue of "The Circle" we did not ask the Trial Court, and we do not ask the Appellate Court to consider the portions printed in French and German because we believe that the English portions, and particularly some of the pictures are unquestionably obscene.

The stories "All This And Heaven Too" appearing on pages 32 and 33, and "Not 'Til The End" appearing on pages 34 through 36, would seem to be in the same category as the story "Sappho Remembered", except that they depict the activities of the male homosexual rather than lesbians. These stories are also obscene because lustfully stimulating to the average homosexual reader.

The picture paper-clipped to page 1 of the magazine is obscene by any standard since it shows the male genitalia. This picture is probably both stimulating to the average male homosexual and filthy and disgusting to the normally inclined person. The sketches on pages 1 and 9 would seem to fall in the same category. We would also raise some question about the photograph on page 19, showing two young men in the nude, one with his hand over his private parts, and the drawing on page 20, showing one male washing the back of the other.

F. The Book as a Whole Doctrine.

Although we have emphasized specific portions of the magazine, we contend that the October 1954 issue of "One" comes within the prohibition of 18 U. S. C. A. 1461, also when tested under the well settled principle that the "book as a whole" must be obscene.

It should first be noted that while the Courts hold that a book must be considered "as a whole" in determining whether it is obscene, magazines have been held to be in

violation of the law solely because of individual articles or pictures contained therein.

Turner v. United States, 35 F. 2d 25 (8 Cir. 1929);

Tyomies Publishing Co. v. United States, 211 Fed. 385 (6 Cir. 1914);

Commonwealth v. New, 16 A. 2d 437 (Penn. 1940).

In discussing the "book as a whole" doctrine, the Superior Court of Los Angeles County in *People v. Wepplo*, 178 P. 2d 853 (Calif. 1947), held, "The problem is to be solved, not by counting pages, but rather by considering the impressions likely to be created. For example, a book might be found to come within the statute although only a comparatively few pages contained matter objectionable according to the principles herein explained, if that matter was such as to offer a strong salacious appeal and to cause the book to be bought and read on account of it."

And in *Besiz v. United States*, 208 F. 2d 142 (9 Cir. 1953), this Court observed:

"We agree that the book as a book must be obscene to justify its libel and destruction, but neither the number of the 'objectionable' passages nor the proportion they bear to the whole book are controlling. If an incident, integrated with the name or story of a book, is word painted in such lurid and smutty or pornographic language that dirt appears as a primary purpose rather than the relation of a fact or adequate description of the incident, the book itself is obscene."

G. The Intent and Motive of the Publisher.

The Appellant has also argued in its Brief, and in its affidavits, that the October 1954 issue of "One" should not be considered nonmailable matter because its publishers acted upon good intentions and motives and upon the advice of counsel.

We believe that as a matter of law these things are immaterial to the issue of this case. If the magazine is obscene it is nonmailable matter, and the Postmaster is simply not permitted to convey it in the mail.

It should be noted that the cases cited by Appellant do not stand for the proposition that guilty knowledge is a necessary element in a case of this kind. All of the cases except *Consumers Union v. Walker*, 145 F. 2d 33 (D.C. Cir. 1944) and *Youngs Rubber Co. v. Lee*, 45 F. 2d 103 (2 Cir. 1930), are criminal cases. The *Youngs Rubber Co.* case, was a trade-mark case in which the Court held that both the private litigants were engaged in an illegal business (contraceptives). The *Consumers Union* case was a civil Post Office case involving an article on contraceptives. The Court enjoined the administrative action because the article was unquestionably scientific in its presentation and purpose, comparable to a similar article appearing in the American Medical Journal. Furthermore, the Court in that case specifically distinguished cases such as the one under consideration with the following language at page 34:

"Cases which uphold the power of Congress to bar from the mails obscene, lewd, lascivious or fraudulent matter, or publications concerning lotteries, or which tend to encourage arson, murder, or assassination are clearly distinguishable."

It should also be noted that even in a criminal proceeding the good motive of the defendant is immaterial if the thing mailed is in fact obscene.

United States v. Dennett, 39 F. 2d 564 (2 Cir. 1930).

It is also well settled that it is no defense to show that the defendant did not personally consider the matter obscene on the advice of counsel.

Schindler v. United States, 208 F. 2d 289 (9 Cir. 1953).

One case cited by Appellant which does hold that the intent of the publisher is to be considered is *Sunshine v. Summerfield* (24 Law Week 2560, D.C. Cir. May 31, 1956). We submit that this case is totally dissimilar to the case at bar and therefore distinguishable.

In the *Sunshine* case, the Court was considering a nudist magazine. The Trial Court and the Post Office Department had found that the subject of nudism and the text of the magazine dealing with it were perfectly legitimate. The decision barring the magazine from the mail was based solely on the photographs of nudists. In reversing, the Court of Appeals said that the Trial Court and the Post Office Department should have considered the intent of the publisher.

The significant thing about the *Sunshine* case is that a picture of a nudist in a nudist magazine, with nothing more, may or may not be obscene. It is possible that the over-all purpose of the magazine is serious and that the pictures are necessary to illustrate the text of the magazine. On the other hand, the basic nature of the magazine may be such that the purpose is not legitimate but

rather is designed to pander to the lewd and lascivious. The intent of the publisher is therefore necessary to decide that question.

In the case of "One" the subject of the magazine is unquestionably homosexuality. We are not here contending that this cannot be a legitimate subject such as nudism. The point we make is that the three portions of the magazine we have emphasized are in no way necessary or relevant to a legitimate discussion of the subject of homosexuality.

We agree with Appellant that this is a knotty problem. We cannot agree however, that this magazine is in any way an answer to the question.

As pointed out above, the story "Sappho Remembered" is lustfully stimulating to the homosexual. This story accomplishes nothing toward solving the problem of homosexuality. If anything, it compounds an already deplorable situation by exciting lewd thoughts and desires in homosexuals.

Going back again to the poem "Lord Samuel and Lord Montagu," we fail to see why the use of filthy language is necessary to a serious discussion of the subject of homosexuality. Obviously it is permissible to use such language in a dictionary explaining the meaning of the words themselves. The fact remains, however, that the words are filthy and that they are in no way related to the problem of homosexuality.

With regard to the pictures in "The Circle", which is advertised in "One," these might have some legitimate pur-

pose in a nudist magazine, in which case it might be relevant to inquire into the intent of the publisher. In a homosexual magazine, however, they are not material to a serious discussion of the subject, and serve only the purpose of pandering to the lewd and lascivious appetite of a homosexual.

Finally, let us assume that the intent of the publisher is relevant to this case. Even if that is so it does not appear that the Trial Court failed to consider this element. In this case the Appellant asked the Trial Court to decide the case on Summary Judgment. In doing so affidavits were filed. After considering these affidavits, which were not controverted by the Appellee, the Trial Court made its Findings of Fact, Conclusions of Law and Judgment in favor of Appellee.

H. The Responsibility of the Advertiser.

The Appellant also contends that it should not be held responsible for advertising of nonmailable matter when it has no knowledge of the nature of the material advertised.

If this were a criminal prosecution under 18 U. S. C. A. 1461, the situation might be different, in that the statute provides that the offense must be committed with guilty knowledge. The statute is in two parts, however. The portion under which the Postmaster refused to accept the magazine provides unconditionally that information for the obtaining of nonmailable matter shall not be conveyed in the mail. The Postmaster does not impose any criminal penalty; he merely follows the mandate of the statute in refusing to transmit nonmailable matter.

II.

The Statute 18 U. S. C. A. 1461 Is Constitutional.

The constitutional objections raised in the Appellant's Brief are that the action of the Postmaster in refusing to accept the magazine for mailing deprives Appellant of equal protection of the laws and constitutes a deprivation of Appellant's property and liberty without due process of law. If the Postmaster has correctly decided to refuse to accept the magazine under authority of 18 U. S. C. A. 1461, and has thus complied with the statute, the question is whether the statute is constitutional.

It is submitted that this question has long since been settled on the theory that the use of the mails is not an absolute right but a conditional privilege, and that Congress may except obscene matter from the mail as a valid condition to the privilege.

Donaldson v. Read Magazine, 333 U. S. 178 (1948);

Public Clearing House v. Coyne, 194 U. S. 497 (1904);

United States v. Rebhuhn, 109 F. 2d 512 (2 Cir., 1940);

Tyomies Publishing Co. v. United States, 211 Fed. 385 (6 Cir., 1914).

Conclusion.

The October 1954 issue of "One" is nonmailable matter, the Postmaster was therefore correct in refusing to accept it for mailing, and the Judgment of the District Court should therefore be affirmed.

Dated: Los Angeles, California, 1956.

Respectfully submitted,

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